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In the Supreme Court of the United States

OCTOBER TERM, 1956

KNUT EINAR HEIKKINEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-14a) is reported at 240 F. 2d 94.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 15a) was entered on January 17, 1957, and a petition for rehearing was denied on February 4, 1957. The petition for a writ of certiorari was filed on March 6, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED[1]

1. Whether Section 20(c) of the Immigration Act of 1917, as amended in 1950—imposing criminal penalties upon an alien ordered deported who shall "willfully" fail to depart from the United States within 6 months or who shall "willfully" fail to make timely application for travel documents—is unconstitutional because it does not provide for a retrial by a jury of the administrative determination that the alien is deportable.

2. Whether the offense of willful failure to depart is excused where the impossibility of departure is created by the alien's own additional offense of willful failure to apply for the necessary travel documents.

3. Whether the 1950 enactment, imposing penalties on one ordered deported under the 1918 Act "as amended", is inapplicable to petitioner because parenthetical citations of the amendments to the 1918 Act, as set forth in the 1950 enactment, did not cite the 1950 amendment to the 1918 Act.

4. Whether the trial court's instructions on willfulness were correct, and whether the evidence supported a finding of willfulness.

5. Whether petitioner's conviction rests upon his own statements rather than on the facts proven by government witnesses.

6. Whether there was any abuse of discretion in the sentence.

STATUTES INVOLVED

Section 20(c) of the Immigration Act of February 5, 1917, as amended (39 Stat. 890, 57 Stat. 553, 64 Stat.

[1] Petitioner's argument (Pet. 14-23) discusses 6 numbered issues in which his 8 "questions presented" (Pet. 2-3) appear in combination and in varying order. We adopt here the numbering and order appearing in his argument.

1010; 8 U.S.C. (1946 ed., Supp. IV) 156(c)), provided in pertinent part:

> Any alien against whom an order of deportation is outstanding under (1) the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 8 U.S.C. 137); (2) the Act of February 9, 1909 as amended (35 Stat. 614, 42 Stat. 596; 21 U.S.C. 171, 174-175); the Act of February 18, 1931, as amended (46 Stat. 1171, 54 Stat. 673, 8 U.S.C. 156a); or (4) so much of section 19 of the Immigration Act of 1917, as amended (39 Stat. 889-890; 54 Stat. 671-673, 56 Stat. 1044; 8 U.S.C. 155) as relates to criminals, prostitutes, procurers or other immoral persons, anarchists, subversives and similar classes, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: *Provided*, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose

of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: *Provided further*, That the court may for good cause suspend the sentence of such alien and order his release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect upon the national security and public peace or safety; (3) the likelihood of the alien's following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inability of the Government of the United States to secure passports, other travel documents, or deportation facilities from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws.

Sections 1 and 4(a) of the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673, 64 Stat. 1006; 8 U.S.C. (1946 ed., Supp. IV) 137, 137-3(a)), provided in pertinent part:

[Sec. 1]. That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * * * *

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * * * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt * * *.

* * * * * *

SEC. 4 (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Seventh Circuit (Pet. App. 15a)

affirming the judgment of the District Court for the Western District of Wisconsin (R. 179-180), upon the verdict of a jury (R. 179), finding petitioner guilty of willful failure to depart from the United States within six months of the entry of an order of deportation (Count One, R. 1-2) and willful failure to make timely application for travel or other documents necessary to his departure (Count Two, R. 2). The record may be summarized as follows:

Petitioner is an alien born in Finland in 1890. He emigrated to Canada in 1910 and acquired Canadian citizenship. He was admitted to the United States for permanent residence in 1916. Subsequent to 1928, he made numerous departures from and re-entries into the United States without the required travel documents. From 1923 to 1930 he was a member of the Communist Party while in the United States. He spent approximately three years, from 1932 to 1935, in the Soviet Union, returning to the United States in 1935 (R. 174-175; Pet. App. 2a).

The initial finding of deportability in the deportation proceedings, dated May 4, 1951 (R. 58, 70), was affirmed by the Assistant Commissioner on October 8, 1951 (R. 58, 70), and by the Board of Immigration Appeals (R. 71). It provided for deportation under the Act of October 16, 1918, as amended, because of petitioner's membership in the Communist Party (R. 70-71).[2] On April 30, 1952, the Immigration and

[2] The deportation proceedings, upon extensive review by the trial judge, were found valid as a matter of law (R. 47, 63-68, 152, 163, 166-167), and this conclusion is not challenged in the questions here presented which relate, instead, to petitioner's contention that a *jury* retrial of the issue of deportability is essential to constitutionality.

Naturalization Service officer-in-charge at Duluth, Minnesota, notified petitioner, by registered mail, at Superior, Wisconsin, where petitioner resided, that an order directing his deportation had been entered on April 25, 1952 (R. 73-75, 77-78). In this notice, it was stated that arrangements were being made to effect the deportation and, when those were completed, petitioner would be notified when and where to present himself for deportation. The notice also set forth the statutory penalty upon an alien guilty, *inter alia*, of willful failure or refusal to depart from the United States within six months or to make timely application for necessary travel documents, and concluded with the warning (R. 75):

> Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950.

At the time of this notice, petitioner was associate editor of a newspaper printed in the Finnish language at Superior, a city located "practically together" with Duluth, where the office of the Immigration Service was located (R. 78-79).

The officer in charge of the Duluth office testified that petitioner failed to depart (R. 84).[3] The officer did not know, and would not necessarily know, of any steps by

[3] Petitioner is in error in stating (Pet. 9) that Exhibit 8 (his own statement to an investigator) was the sole evidence that petitioner had failed to depart; government witnesses also testified thereto.

the government to obtain travel documents (R. 82-83). He further testified that a Canadian passport was presented to petitioner; that petitioner could have proceeded to Canada;[1] and that petitioner's Canadian citizenship was not terminated until after the six months' period for petitioner's departure (R. 85-87). The officer-in-charge directed a subordinate, Maki, to obtain "data concerning his birth and so forth" for the file, to be sent to the District Director of the Immigration and Naturalization Service at Chicago (R. 88-89).

Maki testified that on or about April 18, 1952, he interviewed petitioner for data to be recorded on a passport data form (R. 126). Maki informed petitioner that the form would be sent to Chicago to be considered by the Service with a view toward the Service's obtaining travel documents, which it sometimes did (R. 128, 138-139, 144-145), but that the obtaining of the information did not necessarily mean that the Service would follow through and obtain or attempt to obtain travel documents (R. 129). Maki said nothing to petitioner to indicate that the government would apply anywhere for a passport. He was in no position to do so (R. 130-135, 140-142).

John J. Boldin, an investigator for the Immigration and Naturalization Service, testified that when the six months' period expired in October 1952, and petitioner, pursuant to the statute, was placed under the supervision thereafter required, Boldin inserted in the supervision order a provision requiring petitioner to report on his efforts to effect departure from the United States (R. 122). Petitioner did not comply with this provi-

[1] Only nominal additional papers apparently would have had to be obtained. See R. 140-141.

sion of the order of supervision and at no time reported such efforts (R. 122).

Boldin further testified that on February 12, 1953, he interviewed petitioner with respect to his failure to comply with the notice of April 30, 1952, requiring departure from the United States by October 25, 1952 (R. 93-94, 99, 101). The questions and petitioner's answers were transcribed at the time into a statement sworn to and signed by petitioner, and introduced in evidence (Ex. 8; R. 94-95). In his answers, petitioner asserted that he had understood from his prior interview with Maki that the government, and not he (petitioner), would obtain the travel documents and that petitioner would not need to do anything until he heard from the government (R. 102-106).

The trial judge instructed the jury *in extenso* on the required element of the willful intent (see the Argument, *infra*, pp. 16-18). He refused petitioner's request to instruct that petitioner's continued presence in the United States was not "evidence" of guilt (R. 157).[5]

Petitioner was sentenced to five years' imprisonment on the first count (R. 180). On the second count, imposition of sentence was suspended until after service of the sentence imposed on the first count (R. 180), the trial court indicating probable grant of probation for time in which to effect departure if petitioner then made a genuine effort to depart (R. 175-176).

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[5] Petitioner is in error in stating (Pet. 13) that he was denied an instruction that mere failure to depart is not a violation of the law without willfulness. See R. 158, 166, 168. Petitioner made no objection to the failure to include the literal language of his proposed instructions 7 and 11 (R. 170-171).

ARGUMENT

1. Petitioner was tried before a jury under the statute (*supra*, pp. 3-4) which imposes a penalty upon an alien ordered deported who willfully fails to leave the United States within 6 months or willfully fails to make timely application for travel documents necessary to his departure. The validity of the deportation order, which gave rise to the duties to depart and to apply for documents, has been held in this very proceeding to be subject to judicial review by the trial court as an issue of law,[6] and the order was so reviewed at this trial by the judge.[7] Petitioner, relying upon the dissenting opinion in *United States* v. *Spector*, 343 U.S. 169, 174 (which assumed, however, that under the statute the deportation order *would not be reviewable at all*), argues that, as so construed, the statute is unconstitutional in that the validity of the deportation order is not passed upon by the jury.

This argument is based on a misconception of the nature of the offense. The crime does not consist in being declared deportable, but rather in certain willful conduct when a valid order of deportation is outstanding. The administrative proceeding which results in the order of deportation makes petitioner a deportable alien. But the crime itself is action or non-action by the alien subsequent to, and separate from, the deportation proceeding.

It is a familiar concept in criminal law that a status, liability, or duty may be established administratively, to be followed by criminal consequences in the event of

[6] See the prior opinion in *United States* v. *Heikkinen*, 221 F. 2d 890 (C.A. 7).

[7] Petitioner does not argue that the court's upholding of the deportation order is erroneous. See fn. 2, *supra*, p. 6.

subsequent acts or omissions by the person affected. Where the legislature has the power to invoke the administrative process—as it has with respect to deportation—such criminal legislation has not been deemed invalid because the crimes peculiarly associated with the specific status, liability, or duty may thus indirectly rest upon the original administrative determination. For example, a person denied a driver's license could not lawfully take it into his own hands to drive without a license because the denial was by an administrative body and he was of the view that the denial of his application was unlawful. The same is, of course, true of other licenses. Similarly, hundreds of thousands of draft classifications have been established by administrative determinations, and the refusals to comply with the requirements of the classifications have been made crimes by statute. The validity of the legislation has been upheld (*Cox* v. *United States*, 332 U.S. 442, 453), even though the sole permitted inquiry as to the classification is, as here, a review by the court to determine whether the administrative body properly exercised its functions so that, as a matter of law, its action in creating the status had legal validity. Freight tariffs and price controls by administrative bodies—which are not reviewed by the jury in the criminal case—have also repeatedly been upheld as the foundation for criminal charges. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 81; *United States* v. *Adams Express Co.*, 229 U.S. 381, 388; *Yakus* v. *United States*, 321 U.S. 414, 444-445. In short, there is no constitutional objection to the imposition of duties or consequences, enforced by criminal sanctions, in connection with administrative findings, rulings, or decisions—if those administrative determinations are reviewable by the courts.

Wong Wing v. *United States*, 163 U.S. 228, relied upon in the *Spector* dissent, *supra* (343 U.S. at 174), affords enlightening contrast, rather than support for petitioner's position. Under the statute involved in *Wong Wing*, the question of whether an alien willfully violated regulations was never to reach a court, but was to be decided entirely by a commissioner. The mere entry of an order of unlawful residence resulted, under the statute, in virtually automatic and immediate imposition of imprisonment and "infamous punishment at hard labor" (163 U.S. at 237). No judicial review of the administrative order was provided.

There is a clear and fundamental difference between a provision under which an administrative finding automatically imposes punishment, and statutory provisions, as in the instant case, properly granting authority for the administrative determination of liability or status (with provision for court review); then imposing duties relevant to that liability or status, and providing for criminal punishment only upon a judgment in a criminal trial that the specific duties have been willfully violated. The latter type of statute—which is the type in this case—has often been used in American law, both federal and state.[8]

2. Petitioner argues that he could not have been guilty of a failure to depart since he was also convicted of failure to make timely application for travel documents, and absent these documents it would have been impossible for him to depart. The contention ignores

[8] In the five years since the *Spector* dissent, no court has adopted the broadest segment of its reasoning, although the position has been urged as grounds for challenging statutes imposing duties on deportable aliens (*e.g.*, *Nukk* v. *Shaughnessy*, No. 29 O.T. 1955, Appellants' Br. 20-22; *United States* v. *Witkovich*, No. 295, this Term, Appellee's Br. 19-22).

the objectives patent upon the face of the Act, which lists individual offenses separated by the disjunctive "or." One obvious purpose of imposing a duty to make timely application for documents was to avoid or minimize the necessity of the government's having to expend time and effort to get the departure under way.[9] Moreover, it was known that personal efforts of the alien to obtain documents were sometimes more likely to be successful (especially with some countries) than efforts of the United States government. As observed by the Commissioner of Immigration at the congressional hearings, aliens often could arrange to leave the United States even when their governments had refused to issue travel documents at the request of the United States. Hearings on H.R. 10, before Subcommittee 1, House Judiciary Committee, 81st Cong., 1st Sess., p. 9. And see H. Rep. No. 1192, 81st Cong., 1st Sess., p. 8; S. Rep. No. 2239, 81st Cong., 2nd Sess., p. 7; 96 Cong. Rec. 10675; Hearings on S. 1832 before Subcommittee on Immigration and Naturalization of Senate Judiciary Committee, 81st Cong., 1st Sess., p. 236. In short, the legislation was to give alien deportees, who would otherwise "make no effort to obtain the necessary papers," an "incentive to find a country which would be willing to have them" (96 Cong. Rec. 10453).

Petitioner's failure to apply anywhere was thus a separate offense, susceptible of subjecting the government to effort and expense and to eventual failure in deporting him. This offense might have been petitioner's only offense had the government succeeded in finding documents for him despite his own inactivity, or had

[9] Petitioner was ordered to make monthly reports of his activities of this kind, and failed to comply in this respect, just as in the several respects for which he was indicted. See *supra*, pp. 7-8.

he simply returned to Canada as informally as he had entered the United States. In short, the element of actual departure or non-departure was no part of the offense of failure to apply for travel documents.

On the other hand, the failure to depart is the decisive element of that separate offense. Assuming that it was impossible for petitioner to depart within six months because of his failure to apply for documents, that impossibility could be no excuse for failure to depart if he had created the impossibility as a means of preventing his departure. Had petitioner as willfully created for himself an impossibility of departure by means of an injury to himself or by a destruction of documents obtained by the government, this impossibility, like that in the instant case, would not only be the product of some other offense (*e.g.*, willful destruction of government papers) but also a step in the separate offense of failing to leave the United States. The single act of failure to make timely application can be an offense in itself and also a part or all of the different offense of complete failure to depart from the United States. *Morgan* v. *Devine*, 237 U.S. 632, 640; *Gavieres* v. *United States*, 220 U.S. 338, 342. The decision in *Prince* v. *United States*, No. 132, this Term, is not applicable here, under its own stated limitations resting upon the legislative history of that particular Act.

3. Petitioner also contends that the instant enactment is not applicable to him because it applies to a person ordered deported under "the Act of October 16, 1918, as amended (40 Stat. 1012; 41 Stat. 1008; 54 Stat. 673; 8 U.S.C. 137)," and petitioner's deportation was under an amendment enacted as part of the same legislation and cited as 64 Stat. 1010, which is not listed as an amendment in the parenthetical portion of the enactment.

This hyper-literal approach is unavailing. In the Internal Security Act of 1950 the amendment to add Communist Party membership as an additional ground of deportation appears at 64 Stat. 1006, and specifically states "The Act of October 16, 1918 * * * be, and the same is hereby, amended" to make Communist Party members deportable. The duty to depart appears at a later portion of the statute at 64 Stat. 1012, and its reference to "the Act of October 16, 1918, as amended" includes all prior amendments. The omission of the citation from the parenthetical citation of prior amendments does not override the reference to the Act of 1918 "as amended." The words "as amended" are controlling, and are not nullified by the failure to add, in a supplemental aside, a page reference to the amendment embodied in the same legislation.

That this is the normal and proper reading of the statute is attested by the experienced compilers of the United States Code. In Section 156(e) of 8 U.S.C. (1946 ed., Supp. IV) the penalty for failure to depart is imposed upon "Any alien against whom an order of deportation is outstanding under (1), section 137 to 137-8 of this title * * *." In turn, Section 137-3, in conjunction with Section 137(2)(e), provides for deportation on the basis of Communist Party membership. The same interpretation appears in Supplement V of the 1946 Code, and in the present legislation (8 U.S.C. (1952 ed.) 1251(a)(6)(C)(i), 1252(e)).

Over and beyond the literal incorrectness of petitioner's suggestion, the purposes of the legislation demonstrate its proper construction. The provision for deportation of members of the Communist Party was added in order to close the loopholes in the earlier,

more general, provisions with respect to deportation of subversive aliens. S. Rep. No. 2369, 81st Cong., 2d Sess., p. 10. "It is unthinkable that an enactment to assure prompt departure of subversives from the United States—a provision referring to "subversives" in specific language elsewhere in the same sentence—was ever intended to exclude Communist Party members merely because one citation of an amendment was omitted in a parenthetical citation of amendments accompanying the controlling language, "the Act * * * as amended." [fn]

4. (*a*). Another of petitioner's contentions is that the instructions by the trial judge directed the jury to convict him without proof of willfulness or intent (Pet. 19). The point is answered by the instructions themselves. The charge first included verbatim quotation of the indictment and statute, embodying the word "willfully" no less than four times (R. 164-165). The judge then instructed:

> The law presumes that every man intends the legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed can be neither justified nor excused on the ground of innocent intent.

[fn] The reports of the congressional committees at no point indicate any limitation of the phrase "as amended" to any specific amendments. See S. Rep. No. 2369, 81st Cong., 2d Sess., pp. 10, 12, 14; H. Rep. No. 3112 (Conference Report), 81st Cong., 2d Sess., pp. 54, 56, 60. If the citations of amendments had truly been intended as anything more than a parenthetical—and careless—bit of assistance, language would surely have appeared in the reports indicating why certain subversives were required to depart but Communist Party members, who were then the main focus of interest, were to be left unaffected.

Before you may find the defendant guilty on Count One of the indictment, you must be satisfied from the evidence beyond all reasonable doubt that he, during the period of six months from April 9, 1952, did *willfully* fail to depart from the United States.

Before you may find the defendant guilty on Count Two of the indictment, you must be satisfied from the evidence beyond all reasonable doubt that he, during the period of six months from April 9, 1952, did *willfully* fail to make timely application in good faith for travel or other documents necessary to his departure from the United States. [R. 166; emphasis added.]

* * * * *

You are instructed that the statute on which this indictment is laid, to-wit, Section 156(c), Title 8, United States Code, the material parts of which I have read to you, places upon an alien against whom an order of deportation is outstanding, an affirmative duty and an obligation on his part to take specific steps toward effecting his own departure from the United States, and to that end to make timely application for travel or other documents necessary to such departure. It is the alien's *willful* failure in that regard to fulfill such duty and obligation that is the gist of the offenses here charged.

"Willful" as used in this statute, means *an intentional failure and refusal to comply with the order of deportation.*

There is no duty on the part of the Government to assist the defendant in effecting his departure,

> The Government will, if requested, assist him. But the duty devolves upon the defendant to comply with that order of deportation.
>
> As I say, the material parts of the statute I have read to you place upon an alien against whom an order of deportation is outstanding, an affirmative duty or obligation on his part to take specific steps toward effecting his own departure from the United States. In other words, he can't remain idle. He must take the necessary steps to effect his departure from this country within that period of six months. And if he fails to do so, he has violated the law and the statute involved in this case. [R. 167-168; emphasis added.]

Under these instructions, the jury understood that in order to hold petitioner guilty it must first conclude that his failure to apply for documents and to depart was willful.

(*b*). Petitioner's argument really is that the evidence does not show willfulness, because "according to his testimony" petitioner understood that the Immigration and Naturalization Service was procuring the documents for him (Pet. 20).

First, it is to be borne in mind that petitioner gave no "testimony." He did not take the stand. His claims of misunderstanding appeared indirectly in a statement made to an Immigration and Naturalization Service investigator, sworn to by petitioner but not subject to cross-examination or to the personal appraisal of the jury. As against this, the evidence was undisputed that petitioner had received a notification from the Service, introduced in full in the record (R. 74-75) and clearly showing the distinction between the govern-

ment's efforts to obtain travel documents for him, and the independent statutory duty directly imposed upon him to take steps as well. See *supra*, p. 7. The letter referred to government arrangements being made to effect the deportation, stated that there would be notification of when and where petitioner should present himself for deportation, and noted that there would be a penalty for failure to comply. But the letter continued with a full recital of the statute, with its imposition of a penalty not only upon *refusal* to make timely application for documents and to depart, but also upon *failure* to do so. And the last paragraph specifically stated (R. 75):

> Therefore, you will recognize the importance of making every effort in good faith to obtain passport or other travel documents so that you may effect your departure pursuant to the said order of deportation within the time prescribed by the quotation above from the Internal Security Act of 1950.

The jury could properly conclude from this letter that petitioner was amply advised of his own responsibility to proceed, irrespective of concurrent government efforts in the same direction.

In addition, the jury had before it the testimony of the government witnesses that in their interviews with petitioner there had been nothing whatsoever to cause petitioner to assume that possible government efforts to get petitioner out of the United States were to absolve petitioner of his own duty, imposed directly upon him by the statute. Upon the basis of the direct testimony of these witnesses, the jury could well disbelieve, as mere self-serving excuses and stalling, the petitioner's

assertions to a government investigator that he (petitioner) had assumed that he could with impunity fail to act and allow the government to carry out petitioner's statutory duty. Petitioner was no unschooled, bemused recent immigrant; he was a literate man of mature years who had lived the past 46 years in Canada and the United States and was, at the time, associate editor of a newspaper published in the Finnish language in Wisconsin. He was a citizen of Canada and could have obtained the simple travel documents to return to Canada, well before that country, at a later time, expatriated him.

In sum, the record clearly presented to the jury sufficient objective evidence from which the jury could reasonably conclude that petitioner understood his duty to obtain documents and to leave the United States, but chose instead to stall and to chance the possibility of avoiding the penal consequences of his conduct.

5. The foregoing discussion of the evidence likewise disposes of petitioner's further contention that he was convicted upon his own uncorroborated "confession." Petitioner made no confession. The fact that he failed to obtain documents and failed to leave the United States was at no point in dispute. The only real issue was whether he acted willfully—whether he understood that he was himself under the duty to take these steps. The evidence on this question was developed by the direct testimony of government witnesses. Far from being evidenced by petitioner's statement to the Service investigator, it was denied by petitioner at every point. The conviction rested upon disbelief in petitioner's statement, and belief in the testimony of the government witnesses, rather than upon the disclosures in petitioner's statement.

6. Petitioner's final contention that the court's sentence "failed to take the statute's suspension provisions into account" and violated the statute's "policy" of mercy (Pet. 23) is not valid on the facts of the case. The statute's proviso (*supra*, p. 4) that the judge "may" suspend sentence imposes no mandate to suspend. Moreover, the judge was aware of the available discretion, for he did suspend sentence on one of the counts (R. 180). The discussion at the time of sentence discloses a clear basis for the judge's refusal to suspend sentence on the other count; the judge pointed out the following (R. 174-176):

> The Court: * * * [A]t one time this defendant had offered to him this Court offered this defendant after he was indicted the opportunity to leave the country. He was then a citizen of Canada, and he could have gone to Canada at that time. But he refused that permission of the Court, and he just insisted upon staying.
>
> He has been in this country for all these years; he never became a citizen. While he was in this country he left, according to the record in this case, according to the deportation proceedings, he went back to Russia, he was over there for about three years, learning all he could about Communism; and then he came back here as one of their agents. He came back here without a passport. He left the country, and he came back and came in and went out without passports.
>
> He is the editor of a paper. He is an intelligent man. He knew what he was doing. * * *
>
> * * * I feel that he has simply defied the law—he has set himself up above the law. He just made

up his mind that he was a little higher than the law of this country, and that he didn't have to obey it. Well, he is going to obey the law.

It is the judgment of the Court that this defendant be sentenced to the custody of the Attorney General on Count One for a period of five years.

It is the further judgment of the Court that, on Count Two, the imposition of sentence be suspended until the termination of his sentence on Count One; and then, if he makes an application and makes an honest effort to leave this country and to comply with that order of deportation, then the Court will determine what it will do on Count Two of this indictment.

* * * * *

* * * After he has completed the termination of the sentence on Count One, but at any time during that time he can make his application; but he will serve the sentence on Count One, and then I am suspending the imposition of sentence on Count Two until I determine whether or not he has made an honest application and an effort to leave this country and to comply with that order.

* * * * *

* * * [I]f within the last six months of the term imposed in the sentence of Count One, which is the five years—within that last six months if he makes application to deport himself from this country, then the Court will determine what it will do on Count Two. If he gets out of the country, most likely I will dismiss it. I will put him on probation, possibly, until he has an opportunity to get out of the country.

CONCLUSION

For the above reasons, it is respectfully submitted that the decision of the court below is correct and that the petition for a writ of certiorari should be denied.

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